BALACHANDRAN MAHESAN

v.

K.K. LIM

SUPREME COURT, KUALA LUMPUR
SALLEH ABAS LP
MOHD. AZMI SCJ
WAN HAMZAH SCJ
[CIVIL APPEAL NO. 59 OF 1986]
27 NOVEMBER 1986

ADMINISTRATIVE LAW: *Judicial Remedies - Domestic tribunal - Jurisdiction - Circumstances under which a Court will interfere against the decision of a domestic tribunal - Suspension of appellant - Whether valid - Express undertaking by Club members not to go to the Court before exhausting their domestic remedies - A domestic tribunal acting beyond its jurisdiction by acting contrary to its rules - Whether the aggrieved member need or need not exhaust his domestic remedies in such a situation.*

The appellant (plaintiff in the Court below) was suspended from the Ipoh Club ("the Club") by the management committee for entering a complaint against a fellow member of the Club in a complaint book provided for pursuant to r. 44 of the Club.

The appellant filed a writ for a declaration that his suspension was null and void and that all references of the suspension be expunged from the Club's records.

The reason given for the suspension was that the appellant had allegedly breached a "warning" issued by the Club's management committee forbidding the use of the complaint book for complaints against fellow members. This warning was an alteration and addition to the existing Club rules relating to complaints by members (rr. 44 and 35(1)).

The trial Judge dismissed the appellant's claim. The appellant appealed to the Supreme Court.

Held:

[1] No distinction should be drawn between a suspension and an expulsion from a club when the Court is applying the principles on which a Court would intervene in a decision of a domestic tribunal.

[2] The Court will only interfere against the decision of a domestic tribunal acting under the rules of the club only where

(a) the rules were contrary to natural justice or

(b) what had been done was contrary to club rules or

(c) there was *mala fides* or malice in arriving at the decision.

[3] The Club rules provide a procedure for the amending and making of new rules (rr. 23 and 28(a). The existing rules can only be amended or added to by the procedure provided for.

[4] The "warning" was not a valid bye-law or rule of the Club because the proper procedure for rule making was not adhered to.

[5] The suspension of the appellant therefore was invalid because it was based on the "warning" which was a rule made by the management committee beyond its jurisdiction, i.e., the suspension was contrary to the Club's existing rules.

[6] Where there is an express undertaking by club members not to go to the Court before exhausting their domestic remedies or where the rules of the club provide for an appeal to a domestic tribunal, aggrieved members must exhaust their domestic remedies before resorting to the Court.

[7] But where the domestic tribunal itself has acted beyond its jurisdiction by acting contrary to its rules, the aggrieved member need not exhaust his domestic remedies.

[Appeal allowed with costs. Order of Court below set aside and decision of the Club Committee to suspend appellant declared null and void. Order of suspension and all references of suspension be expunged from Club's records.]

[Editor's Note: In his dissenting judgment, Wan Hamzah SCJ was of the opinion that the appellant was bound by the rules of the Club to exhaust his domestic remedies before resorting to the Court. On the basis of that he would have dismissed the appeal.]

Cases referred to:
Chong Kok Lim & Ors. v. Yong Su Hian [1979] 2 MLJ 11
Burn v. National Amalgamated Labourers' Union [1920] 2 Ch 364
John v. Rees [1970] Ch D 345
Dawkins v. Antrobus [1881] 17 Ch D 615
Bonsor v. Musicians' Union [1954] 1 All ER 822
White v. Kuzych [1951] AC 585
Tharmalingam v. Sambanthan [1961] MLJ 63
National Union of Commercial Workers; Wong Yoon Leong & Ors. v. S. Balasingam & Ors. [1974] 1 MLJ 172

For the appellant - R.J. Manecksha; M/s. Lim Kean Siew & Co.
For the respondent - W.S.W. Davidson; M/s. Azman, Davidson & Co.

JUDGMENT

Mohd. Azmi SCJ:

The appellant, a lawyer formerly residing in Ipoh, was suspended for seven days from membership of the Ipoh Club, for entering a complaint on 11 April 1985 against a fellow member named Zulkifli Tan and six unnamed committee members, in a complaint book provided under r. 44 of the club rules. The order of suspension was made in his absence on 26 April 1985 after the management committee had found him guilty of misusing the complaint book. Contending that he had not by such conduct committed any breach of the club rules, and feeling that he had been victimised by the committee because his complaint had also implicated the respondent who was the president of the club and other members of the committee for dereliction of duty, he filed a writ suing the respondent on his own behalf and also on behalf of all other members of the committee, in which he sought a declaration that the suspension order was null and void, and secondly for an order that all references of the suspension being expunged from the club's records and thirdly for damages and costs. The case was heard before Anuar J who dismissed the claim on 28 January 1986 with costs. The learned Judge held that the committee had not misinterpreted the club rules and that the appellant was lawfully suspended from membership for committing a breach of the new ruling contained in a 'warning' which required that the complaint book be strictly used only for complaints against the quality of club's services or operations and that any personal complaint against members should be sent directly to the club secretaries. The Judge also held that there had been no breach of the rules of natural justice since the committee had

notified the appellant of the charge against him; had given him an opportunity to be heard; and had his case heard by a domestic tribunal properly constituted under the club rules although members of the tribunal "might fairly be suspected of a bias" against the appellant.

Although one week suspension against an outstation club member even of 12 years' standing may appear as a trivial matter for the attention of the Court, the principle involved is by no means trifle and unimportant, as it concerns the question of how far and to what extent the Courts will interfere in the affairs of a social club. In *Chong Kok Lim & Ors. v. Yong Su Hian* [1979] 2 MLJ 11 the Federal Court laid down the principle upon which Courts would intervene in decisions of domestic tribunal in relation to the power of expulsion of a member. Further, the principle that no distinction should be made between suspension and explusion in relation to the rules of natural justice laid down in *Burn v. National Amalgamated Labourers' Union* [1920] 2 Ch 364 was adopted by Megarry J in *John v. Rees* [1970] Ch D 345 because "in essence, suspension is merely expulsion *pro tanto.* Each is penal and each deprives the member concerned of the enjoyment of his rights of membership or office". Although *Burn's* case concerned a trade union we fail to see why the same principle should not in appropriate cases, apply to social clubs merely because they do not involve a man's means of livelihood. In *Dawkins v. Antrobus* [1881] 17 Ch D 615 it was held that the Court would not interfere against the decision of the members of a club professing to act under their rules unless it could be shown (1) that the rules were contrary to natural justice, or (2) that what had been done was contrary to the club rules, or (3) that there had been *mala fides* or malice in arriving at the decision. To appreciate the validity and bona fide of the appellants complaint, we set out below its full text as contained in the complaint book:

> 11 April 1984, Mr. President and Members of the Honourable Committee,
>
> I came in to the "Long Bar" on my way back to Penang and in an endeavour to cool myself, I had the misfortune to witness a very unpleasant incident. Dr. Chan Wai Keong and his guest (a lady) were peacefully having their evening only when Encik Zulkifli Tan (3340) confronted them and abused them. This went on from 7.00 p.m. to 7.45 p.m.
>
> What surprises me is that at the material time there were 6 (six) members of the Committee in the Long Bar who in their casual manner abdicated their duty and 'ran' off. Dr. W.K. Chan in all fairness upheld the requirements of a member of the Club and I am appalled at the behaviour of member (3340) and the attitude of the members of the Committee who were present.
>
> I feel that there is no need for a complaint and that the Committee should take steps to suspend/ expel member 3340. His behaviour was disgusting and Ipoh Club does not need such member.
>
> Balachandran Mahesan.
> (signed)
> (2450)

There was no evidence to suggest that the substance of the above complaint was baseless or a figment of the appellant's imagination so that ordinarily his conduct could not remotely be classified as 'misusing' the complaint book or one which could be described as unbecoming of a member of the club or injurious to the character or interest of the club. Indeed Encik Rahim Noor (DW2) a senior committee member and also a lawyer agreed in cross-examination that Zulkifli Tan was making a nuisance of himself and that in the past, fights had occurred in the club as a result of nuisance, and that the appellant's complaint was legitimate. Yet, why was the appellant charged at all for allegedly committing a breach of the club rules? What was the need of punishing a conscientious member? This is the peculiar aspect of the present appeal.

For ease of reference, the relevant provisions of the club rules are now reproduced:

Rule 23. No Rule of the Club shall be repealed or altered and no new Rule made except by way of a resolution passed at an Annual or Extraordinary General Meeting convened under rr. 14 or 18. Such resolution shall not be carried except by a two-thirds majority of those members voting.

Rule 28(a). The Committee shall have power to frame and pass, and when passed alter, add to or repeal Bye-Laws of the Club for the regulation of the affairs of the Club. Such Bye-Laws so made altered or added to shall be entered in a book kept for the purpose and be posted in such parts of the Club as may be the subject of such Bye-Laws for the inspection of Members and shall come into operation on such posting and be binding on all members after such posting. Such Bye-Laws may be altered or repealed by an Annual or Extraordinary General Meeting of the Club.

Rule 28(k). The Committee shall have power to decide all questions as to the meaning and interpretation of the existing Rules and Bye-Laws of the Club and to decide any questions which may arise and which may not be covered by the Rules and Bye-Laws of the Club. All such decisions shall be final unless reserved by a General Meeting.

Rule 35(1). If the conduct of any member shall be brought to the notice of the Committee either by a Member of Committee or by a written complaint signed by ten members of the Club, the Committee shall make such inquiry into the matter as it may consider necessary, and if it shall be of opinion that the conduct complained of or brought to its notice as aforesaid is unbecoming to a member of the club or injurious to the character, or interests of Club, then, and in such case, the Committee may:

(a) Suspend such member ...
(b) Recommend such member to resign his membership ...
(c) Expel such member from the Club ...

Provided always that before using any of the powers conferred on it by the above Clause (a), (b) and (c) the Committee shall allow the member an opportunity for oral or written explanation of his conduct.

Rule 35(2). Such member shall within 21 days of the decision being communicated to him appeal in writing to the Committee against such decision and the Committee shall call an Extraordinary General Meeting of the Club in accordance with the procedure in r. 15 and if at such Extraordinary General Meeting a majority of those present and voting are against the suspension, recommendation or expulsion, as the case may be then such suspension, recommendation or expulsion be cancelled and the member in question shall be reinstated, suspended or otherwise dealt with as the Extraordinary General Meeting shall decide and such decision shall be final.

Rule 44. Complaints or suggestions may be entered by members in the books provided for the purpose and will be dealt with provisionally if necessary in the first instance by the House Member in office at the time, and finally by the committee of the Club at their first meeting after entry of the complaint or suggestion.

Rule 47. Any complaint as to the conduct of any servant of the Club shall be made in writing to the Secretaries or entered in the complaint book. In no case shall a servant of the Club be reprimanded or punished directly by a member.

To determine whether the management committee, which under the club rules was also the disciplinary committee, had acted within or without its jurisdiction, it is essential to consider the charge on the ground that if the charge was invalid, in that it did not constitute any breach of the club rules or bye-laws it must necessarily follow that the domestic trial was a nullity. The offence must be for breach of any rule or bye-law to which members of the club

were contractually bound. By his conduct on 11 April 1985, the appellant was alleged to have committed a breach of a new ruling in the 'warning' issued by order of the committee on 1 August 1984, full text of which is now reproduced:

WARNING

1. The book is strictly meant for complaints by members (excluding junior members, lady associates, visiting members, sports members, day members and guests) against the quality of club's services or operations only.
2. Any complaint against the conduct of other members or club policy should be addressed to the President or Secretaries in a separate letter and sent or handed to the club office.
3. Under no circumstances should members write comments in the same book on other member's written complaints.
4. Members who misuse the complaint book following the issue of this warning shall be deemed to have breached the club rules (35 or 49 or 51) and shall be dealt with accordingly.
5. Whenever in doubt, you are advised to follow procedure outlined in para. 2.

By order of the committee

1 August 1984

The validity of the 'warning' was canvassed in the High Court and repeated before this Court. In our opinion, what is pertinent is the status of the 'warning' in terms of the club rules and bye-laws. From the testimony of the respondent (DW1) there can be no doubt that he was the best person to explain the background of the new ruling in the 'warning'. After all the document was drafted by him and the committee had decided to issue it in 1984 and to publish it in the news bulletin of the club. Although Counsel for the respondent, both here and in the Court below, had attempted to justify the validity of the 'warning' by relying on r. 28(k), there was no evidence to support the contention that it was issued by the committee pursuant to that sub-rule as a result of any ambiguity in the meaning of r. 44 of any other rules of bye-laws of the club. To all intents and purposes, the 'warning' was treated throughout by the committee as a new rule or bye-law to curb the activity of some members in using the complaint book for mud-slinging purposes. In the words of the respondent, "The object of the ruling is to stop members from attacking each other; to protect names of persons who are innocent (and) who are unnecessarily being slandered". In our view, the committee had no power to create new contractual terms for the club members under r. 28(k). The said sub-rule cannot be extended for that purpose in circumvention of the mandatory provisions of rr. 23 and 28(a), and it certainly cannot apply where the meaning of the rule is clear and requires no interpretation, or where the subject-matter is already covered by existing rules or bye-laws. It has never been the case for the respondent that there is ambiguity in r. 44, which plainly confers a right to club members to make legitimate complaints in the complaint book or books, and also imposes obligation on the part of the committee to deal with such complaints. In addition, r. 47 makes special provision for written complaints against conduct of any servant of the club. Such complaints can either be entered in the complaint book under r. 44, or made in writing to the club secretaries. Similarly complaints against fellow members include committee members, can be made in the complaint book under r. 44 or alternatively by a written complaint signed by ten members addressed to the committee under r. 35(1). The 'warning' is clearly an attempt by the committee to amend rr. 44 and 35(1), or to introduce a new club rule or bye-law pertaining to complaints against

club members akin to complaints against servants in r. 47. The effect of the new ruling is to prohibit individual members from using the complaint book against other members under r. 44, and at the same time altering r. 35(1) by allowing such complaint to be made by individual instead of ten members to the club president or secretaries instead of the committee. We are of the opinion such substantial amendments to the club rules cannot be made by means of a 'warning' under r. 28(k), and it cannot form a valid part of the club rules or bye-laws, since it was purely the creation of the committee and was not passed as a club rule by resolution at a general meeting in accordance with r. 23, or passed as a bye-law by the committee in accordance with the requirements of r. 28(a). Although Counsel for the respondent was at pains to show that certain parts of the 'warning' were displayed on and inside the pages of the complaint book, there was no evidence that the 'warning had been posted in the club premises for the inspection of members and entered in a book kept for that purpose pursuant to r. 28(a). The only way the contractual terms between the club members can be varied or altered is by amending the relevant rules or bye-laws under rr. 23 or 28(a). Consequently, the learned trial Judge erred in law and in fact when he held that the 'warning' was valid merely on the basis that the committee would be the best body to decide what suggestions could go into the complaint book and that 'good reasons' had been given by the committee for imposing the restriction. But he failed to consider the provisions of rr. 23 and 28(a), r. 35(1), and r. 44 read with r. 47, before deciding whether the committee could validly impose the new ruling without amending the club rules or bye-laws. It would have been an entirely different matter if the committee had confined itself to prohibiting members from using the complaint book for any illegitimate purpose. However noble its motive, the committee could not deprive the club members of their existing rights to use the complaint book legitimately. In our view, the disciplinary committee had obviously acted beyond its jurisdiction, and the purported exercise of disciplinary action by the committee based on a new ruling in the'warning', *ultra vires* club r. 44 read with rr. 35(1) and 47, and merits interference by the Court (*see Bonsor v. Musicians' Union* [1954] 1 All ER 822 CA @ 825).

In view of our conclusion that the disciplinary committee had acted beyond its jurisdiction, there is no necessity for us to deal with the issue of denial of natural justice on the ground of bias or malice. The only remaining issue is the right of the appellant to come to the Court without first exhausting his domestic right of appeal under r. 35(2). It is the submission of Counsel for the appellant that such an appeal is an exercise in futility since the order of suspension of membership which took effect on 29 April had already been carried out fully by the time the committee decided to stay the order *vide* its letter dated 10 May 1985. Where there is an express undertaking by members of a Club or Association not to go to the Court before exhausting their domestic remedies, or where the rules of the Club or Association make provisions for appeal to a domestic tribunal which can be interpreted as amounting to such an undertaking, it is incumbent on aggrieved members to exhaust their domestic remedies before resorting to the Court, unless the disciplinary committee or tribunal itself is guilty of acting beyond its jurisdiction by exercising disciplinary powers in a manner contrary by its rules or constitution. This distinction between a domestic tribunal acting within and acting without jurisdiction is recognised by the Privy Council in *White v. Kuzych* [1951] AC 585 and also by Thomson CJ in *Tharmalingam v. Sambanthan* [1961] MLJ 63 @ 65 CA. Without providing an answer, the Privy Council posed the following question at p. 598: "...is the conclusion of a judicial tribunal acting within its jurisdiction, which is arrived at in a way which amounts to a denial of natural justice, appealable, or, on the contrary, is it simply void and thus not subject to appeal at all?" There is no necessity to deal with that question in this appeal,since the disciplinary committee had acted beyond its jurisdiction and its decision

was void, and as such the appellant should not be required to exhaust his domestic remedies before coming to the Court. In similar circumstances in *Bonsor v. Musicians' Union* (*ante*) Sir Raymond Evershed MR said at p. 825:

> It is true that the plaintiff did not take advantage of his right of appeal under the rules, but I cannot see how that affects the plaintiff's right to come to this Court and say that the purported expulsion was *ultra vires* the rules and ineffective.

We would therefore allow this appeal with costs. The order of the Court below is set aside and we order that the decision of the club committee to suspend the appellant be declared null and void, and the order of suspension and all references of the suspension be expunged from the club's records. The trial Court was urged to award damages in the region of RM15,000, but since the appellant no longer presses for such sum now, we would assess damages nominally at RM1 notwithstanding the fact that he had been a member of the club for 12 years, and was also serving as committee member in other social clubs in Penang. In our opinion, it is only fair and proper that costs of this proceeding both here and in the Court below be borne by the respondent. The deposit should also be refunded to the appellant.

Wan Hamzah SCJ:

This is an appeal by the plaintiff in the Ipoh High Court Civil Suit No. 821/1985 against the dismissal of his claim. He had been suspended by the kelab Ipoh committee (the defendant) from membership for a period of seven days on a charge that he had committed a breach of the committee's ruling in that he had entered a complaint against another member and against certain committee members in the complaint book. He brought the suit for a declaration that the decision of the committee to suspend him is null and void on the ground of defiance of natural justice by the defendant when holding inquiry into the charge, in that K.K. Lim the defendant who had lodged the complaint against the plaintiff leading to the charge presided over the committee meeting holding the inquiry, and in that the members of the committee against whom the plaintiff had entered a complaint in the complaint book took part in the meeting and inquiry. The plaintiff also avers that in further breach of natural justice the defendant had denied him the opportunity to present his case orally and of the right to state his case for mitigation, and further the defendant had failed to state in the agenda of that committee meeting that the charge against him was to be discussed.

In defence the defendant contended that the plaintiff should have exhausted the domestic remedies before coming to the Court. The defendant relies on r. 35(2) of the rules of the club, which gives the right to a member whom the committee has decided to suspend or expel to appeal to the extraordinary general meeting of the club. In *White v. Kuzych* [1951] AC 585 the respondent, a member of the appellant trade union was found guilty by a certain committee of the union of offences committed in breach of the bye-laws of the union. As the result a general business meeting of the union passed a resolution expelling from the union. Article 26 of the bye-laws provided that if a member so found guilty by a general business meeting "feels that the decision is unfair, or the penalty too severe, he may, within sixty days, file an appeal in writing with the executive of the Shipyard General Workers' Federation". The respondent had taken an oath by which he was contractually bound under the bye-laws, promising that he would not become a party to any suit at law or in equity against the union or the Federation until he had exhausted all remedies allowed to him by the bye-laws. The respondent, without first appealing to the Federation instituted the action for a declaration that he had not been validly expelled from membership of the union. He attacked the conclusion of the general business meeting on the ground that it was arrived at by methods which made it contrary to natural justice and that it

was the result of bias and even intimidation. It was held by the House of Lords that the conclusion reached by the general meeting was a "decision" within the meaning of that expression in the bye-laws even if it was tainted by bias or prejudice or arrived at in defiance of natural justice, and even if the voting of some members might have been affected by intimidation; accordingly, the conclusion reached by the general meeting was subject to appeal to the Federation, and that was the appeal which the respondent was bound by his contract to pursue before he could issue his writ. There is no doubt that the appellant in the present case is contractually bound to comply with r. 35(2). On the authority of *White v. Kuzych*, in my opinion he should have exhausted the remedy provided in that Rule before resorting to the Court process.

The appellant also contends that the committee had no authority to issue the ruling that a complaint against the conduct of a member should not be entered in the complaint book and such complaint should be sent direct to the secretaries or to the president. He contends that such ruling was *ultra vires* r. 44, and therefore the charge of breach of such ruling was invalid. In my opinion the Court is not the right forum to determine the issue. The appellant should have brought an appeal in accordance with r. 35(2) and taken up this issue for determination by the domestic forum, i.e. the extraordinary general meeting: Re *National Union of Commercial Workers; Wong Yoon Leong & Ors. v. S. Balasingam & Ors.* [1974] 1 MLJ 172. In that case certain members of the National Union of Commercial Workers applied to the High Court for a declaration that the resolution made by the national executive council of the union postponing the biennial delegates conference beyond 30 September 1973 was *ultra vires* r. 9 of the Rules and Constitution of the union which provided that the biennial delegates conference of the union shall be convened as soon as possible after 31 March and not later than 30 September every alternate year. It was held that the dispute should first be decided by reference to arbitration in accordance with r. 26 of the union, which provided that every dispute between a member and the union shall be decided by reference to arbitration.

In my judgment the appeal should be dismissed.

Also found at [1987] 1 CLJ 525